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No. 528.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1903.

WALTER N. DIMMICK,

Appellant,

vs.

JOHN W. TOMPKINS, the Warden of the State Prison of California,

Appellee.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

This is an appeal from the judgment and order of the United States Circuit Court, Northern District of California, denying and refusing to the appellant, Walter N. Dimmick, the writ of *habeas corpus*..

It appears from the petition and complaint that the appellant is unlawfully imprisoned by the respondent, John W. Tompkins, the warden of the State Prison of California, at San Quentin; that the imprisonment is in contravention of the Fifth Amendment to the Constitution in that the appellant is deprived of his liberty under pretense of Federal authority and without due

process or any process of law; that on *October 16th, A. D. 1901*, the prisoner was sentenced by the United States District Court, Northern District of California, upon conviction of alleged crime; to wit: Upon a verdict of guilty on the first and fourth counts of the indictment, and for what is alleged to be a violation of sections 5438 and 5497 of the Revised Statutes of the United States; that the sentence and judgment of the District Court directs the imprisonment of the appellant for the term of "*two "years, from October 16th, A. D. 1901.*" The petition and complaint for the writ of *habeas corpus* further shows that immediately upon the pronouncing of the said judgment the petitioner was imprisoned by order of the District Court and "under said judgment" in the County Jail of the County of Alameda; and was thus imprisoned until the 13th day of April, A. D. 1903, when he was removed to the State Prison at San Quentin, to serve his sentence, or, more accurately speaking, to serve the remaining portion of his sentence; that his said sentence expired on the 21st day of September, A. D. 1903, as the result of the credits earned by him for good behavior; *that in any event, the sentence by its very terms and by its own limitation, expired on the 16th day of October, A. D. 1903.* The application for the writ of *habeas corpus* was filed in the Circuit Court of the United States, on the 19th day of October, A. D. 1903, and was sworn to on the 17th day of October, A. D. 1903; the intervening day was Sunday. The petition and complaint set forth in *haec verba*, the judgment of the District Court and the verdict and indictment. The application for the writ was presented in open court and the court denied it; but

allowed an appeal to the United States Supreme Court. The appeal was thereupon duly perfected. No opinion was rendered by the Circuit Court.

II.

ERRORS ASSIGNED.

The judgment and order appealed from are erroneous in the following particulars as set forth in the assignment of errors, viz:

1. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the term of imprisonment of the said Walter N. Dimmick had not expired.

2. That the said United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the said appellant is not entitled to the issuance of the writ of *habeas corpus*, upon the showing made in the petition therefor.

3. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in denying the petition for the writ of *habeas corpus* and in denying the said writ of *habeas corpus*.

4. That the said United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that it was lawful for the District Court of the United States, Northern District of California, to sentence the said Walter N. Dimmick to an imprisonment in the penitentiary of the State of Cali-

fornia, at San Quentin in said state, the fact being, as appearing from the said petition for the writ of *habeas corpus,* that the said imprisonment does not exceed the period of one year on each count of the indictment upon which the said Walter N. Dimmick was convicted and sentenced in the said United States District Court.

5. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the said Walter N. Dimmick is not deprived of his liberty without due process of law, in contravention of Article V of the Amendments to the Constitution of the United States.

6. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the first count in the indictment set forth in the petition for the writ of *habeas corpus,* charges or states facts constituting a crime or public offense against the United States, or that the matters set out in said first count constitute a violation of a law of the United States, prescribing punishment by imprisonment.

7. That the United States Circuit Court for the Ninth Circuit. Northern District of California, committed manifest error in deciding that the fourth count in the indictment set forth in the petition for the writ of *habeas corpus,* charges or states facts constituting a crime or public offense against the United States or that the matters set out in said fourth count constitute a violation of a law of the United States prescribing punishment by imprisonment.

8. That the United States Circuit Court for the Ninth Circuit, Northern District of California, committed manifest error in deciding that the judgment set forth in said petition is not void and that the same does not deprive the said Walter N. Dimmick of his liberty without due process of law, in violation of Article V of the Amendments to the Constitution of the United States.

9. That the said Walter N. Dimmick is deprived of his liberty without due process of law, and in contravention of the Constitution and laws of the United States.

Each of these errors is supported by the petition and complaint for the writ of *habeas corpus*. As already stated, the Circuit Court refused to issue the writ, holding that the matters set forth in the petition were insufficient in law to sustain the application.

BRIEF OF ARGUMENT.

I.

The first point we urge in support of our prayer for *reversal* of the judgment and order of the Circuit Court denying the application for *habeas corpus* is this: By the express terms of the judgment of the District Court the term of appellant's imprisonment is two years, from *October 16th, 1901*—"It is therefore ordered, ad-" judged and decreed that the said Walter N. Dimmick " be and he is hereby sentenced to be imprisoned at " hard labor for the term of two years, from October " 16th, 1901; and it is further ordered that said sentence

"of imprisonment be executed upon the said Walter N. "Dimmick by imprisonment in the State Prison of the "State of California, at San Quentin, Marin County, "California.

"JOHN J. DEHAVEN,
"United States District Judge,
"Northern District of California."

It is a mere matter of arithmetic that the sentence expired by its own limitation on the 16th day of October, 1903, assuming there was no deduction for credits earned by good behavior. It surely is competent for a court to fix the date of the commencement of the term of sentence (Ex Parte Gibson, 31 Cal. 627; Woodward vs. Murdock, 124 Ind. 439; State vs. Gaskins, 65 N. C. 320; Kelly vs. State, 3 Sm. & Mar. 518); and of course when fixed, it becomes an essential part of the judgment; and cannot be ignored nor rejected; to do so, would be to render a new and entirely different judgment—one not pronounced by the trial court. There are two separate and distinct parts to the judgment; one part fixes the term of the sentence; the other fixes the place of imprisonment. The point now presented relates only to the term of the sentence and has nothing to do with the place of imprisonment. So far as we are advised, the authorities are all one way on the proposition, and hold that the *term* of sentence runs from the date fixed in the judgment for its commencement, irrespective of the actual imprisonment or of its duration; this of course upon the theory that the sentence *as prescribed,* is the warrant in the hands of the prison keeper, and that he being merely a ministerial offi-

cer, cannot look beyond the express terms of the sentence, that the sentence is the measure of his authority to imprison; and that therefore he must obey its mandate and cannot reject nor eliminate any part of it; to permit him the power to say that the sentence does not run from the date which it expressly prescribes as the commencement of the term of sentence, and to substitute the date of the commencement of the actual imprisonment, as the beginning of the term of sentence, is clearly to give him authority to change the judgment of the court; and its logical effect is to give him the right to imprison without due or any *process* of law whatever. Instead of the term of sentence being matter of record as the law requires it to be, it would become entirely matter *in pais*. Clearly, no imprisonment can be had in contradiction of the judgment. The term of a sentence to imprisonment is not at all synonymous with the duration of the actual imprisonment; the latter can never lawfully exceed the term of the sentence; the term of the sentence is to be ascertained from the language used in designating the length of the term, and its commencement; the actual imprisonment is always subordinate to the term prescribed in the sentence; and of course, reference can only be had to the language of the sentence; the requirements of the *sentence* as to commencement and duration must always control irrespective of the length of the actual imprisonment; to permit an imprisonment after the expiration of the time designated in the *sentence*, is necessarily to authorize or permit an imprisonment without due or any process of law; a process that has *expired* by its own limitation, can never be made the basis for nor

constitute due or any process whatever. We insist on the self-evident distinction between the term of the sentence; and the term of actual imprisonment. The sentence is one thing; its satisfaction is quite another and essentially different thing. The sentence as expressed in the judgment is alone the only lawful authority and warrant for the imprisonment; the latter must, in all cases, be within the limitation as fixed in the sentence. The imprisonment must always conform to the term as fixed in the sentence; otherwise there is no written warrant for the imprisonment. Suppose the sentence expressly states, as does the sentence in this case, that the term of imprisonment shall expire two years from the 16th day of October, 1901, would an imprisonment occurring subsequently to October 16, 1903, be warranted or authorized by the *sentence?* Certainly not; it is a palpable fallacy to suggest that the sentence in this case has not been *satisfied* and cannot be satisfied by imprisonment in the penitentiary for the six months actually served by the prisoner in that institution. The question is not, what constitutes a *satisfaction* of the sentence; but whether the sentence has expired by its own limitation as to its duration. If it has expired, then there is no longer any basis for due or any process of law to authorize imprisonment, and the imprisonment must necessarily be in violation of the Fifth Amendment. The sentence is not that the appellant be imprisoned in the penitentiary for two years; but that he be imprisoned for the term of two years from *October 16, 1901;* a sentence of that character may as a matter of law, become impossible of execution by the lapse of time without imprisonment at all. It is conceivable that the

term of the sentence may well expire before the actual imprisonment even begins. The Supreme Court of Illinois recognized the correctness of that very obvious proposition in the case of

Johnson vs. People, 83 Ill. 431, 437.

We quote the following from the opinion in that case, viz:

"But the court below erred in the judgment it rendered on the verdict in this case. It fixed the day and hour when the imprisonment should commence under each count upon which plaintiff in error was found guilty. Since a *supersedeas* was granted in this case, *it has become impossible that the judgment of imprisonment can be carried into effect, as the time fixed by the court has elapsed and expired* (italics ours). Other contingencies might arise which would render it impracticable to carry such a judgment into effect. The sentence to imprisonment should be for a specified number of days under each count upon which a conviction is had, and the judgment should require that the imprisonment under each succeeding count should commence where it ends under the preceding count, without fixing the day or hour for each or either to commence or end. For this error the judgment of the court below must be reversed and the cause remanded with directions thatt the court enter a proper judgment on the verdict."

Johnson vs. People, 83 Ill. 431, 437.

The judgment however cannot be changed after it is partially executed by imprisonment for a portion of the time prescribed.

Ex Parte Lange, 18 Wall. 163, 173, 176.

And in a case before the Supreme Court of Indiana, it is very forcibly said by the court:

" It was only by virtue of the judgment of the Marion " Criminal Court that the appellant was held as a pris- " oner; it by its very terms only condemned him for five " years from its date, less any time for which under the " law he might be entitled to credit. The law allowing " him credit for good time entered into the judgment as " if written therein, and therefore, by the very language " of the judgment, the appellant's term expired on De- " cember 13, 1889. It is only by virtue of the judgment of " a court of competent jurisdiction that a citizen can " be condemned to imprisonment, and when the time ex- " pires for which the sentence runs, as given in the judg- " ment, the prisoner is entitled to his discharge. This is " not a new question in this court. See Flora vs. Sacha, " 64 Ind. 155."

Woodward vs. Murdock, 124 Ind. 439.

Says Bishop:

" The day on which a prisoner is sentenced will be reck- " oned as a part of his term of imprisonment."

Bishop on Stat. Crimes, sec. 218;
Com vs. Keniston, 5 Pick. 420.

The question really needs no citation of authority. It is quite elementary that the terms of the judgment are the absolute and exclusive measure and limitation of the sentence. Therefore it is only necessary to ascertain the contents of the judgment to determine the limitation of the imprisonment. The authority of the prison-keeper is restrained and defined by the terms in which the sentence is expressed in the judgment; any other view would dispense with the necessity of a written judgment and with the necessity of process in execution of the judgment. Again we point out,—the question is not as to whether the sentence has been *satisfied;* but whether the term of the sentence as expressed in the judgment has expired by the very limitation placed upon it in the sentence itself; upon both principle and authority, the conclusion must be in the affirmative. The sentence is precisely the same as though the District Court had expressly stated in it, that the authority for the imprisonment *expires on the 16th day of October, 1903.*

II.

THE SENTENCE HAS BEEN FULLY SATISFIED.

The next point we urge is, that the sentence has been fully satisfied by the actual imprisonment of the appellant for the period of *two years.* This point of course has no relation whatever to the point last raised. The point we are now presenting, necessarily proceeds on the assumption that the sentence can only be *satisfied* by two years actual imprisonment. It appears from the petition

and complaint for *habeas corpus*, that on the very
the sentence was pronounced, to wit: on October 1
1901, the appellant was by the District Court and "un
"the judgment" that had been rendered against h
committed to the County Jail of Alameda County
that he there remained a prisoner until April 13th, 19
when he was removed to the State Prison at San Quen
where he has ever since been imprisoned. Now the
is, that where a person is sentenced to the penitentia
for an offense which is only a *misdemeanor*, the time
spends in the County Jail, subsequent to judgment m
be credited on the sentence even though its terms requ
incarceration in the penitentiary.

People vs. Lincoln, 62 How. Pr. 412;
Bishop on Stat. Crimes, sec. 218.

The reason for the rule is self-evident; in the punishm
of a *misdemeanor*, the character of the prison is of
consequence; in the punishment of felony, it is the ch
acter of the prison that makes it a felony; therefore, if
a conviction of a *misdemeanor* the sentence is to the pe
tentiary and the actual imprisonment is nevertheless i
County Jail, the time thus served in the County Jail
a satisfaction of the sentence either *pro tanto* or entir
according to the time served. When the State impris
a person convicted of a *misdemeanor*, no matter wh
the imprisonment is had, even though it be not the pri
designated in the judgment, the time thus served in
is to that extent a *satisfaction* of the sentence.

People vs. Lincoln, 62 How. Pr. 412;
In Re Jennings, 118 Fed. Rep. 481.

It is the fact of imprisonment rather than the place of imprisonment that *satisfies* a sentence for a misdemeanor. In legal effect, the order of the District Court made immediately after judgment, directing the appellant's imprisonment in the County Jail of Alameda County, was to that extent, a modification of the judgment as to the place of imprisonment.

But whether that is so or not, the law is well established that the time served by the appellant in the county jail of Alameda County, is a *pro tanto* satisfaction of the sentence, if the conviction was for a *misdemeanor* and not a felony. That the conviction of appellant for violating sections 5438 and 5497 of the Revised Statutes of the United States, is a conviction of a misdemeanor and not the conviction of a felony, we cite the following authorities as being directly in point:

Ex Parte Wilson, 114 U. S. 422;
Mackin vs. United States, 117 U. S. 350;
Bannon vs. United States, 156 U. S. 466, 477;
Regan vs. United States, 157 U. S. 303.

The law of the State of California prohibits the imprisonment in the penitentiary of persons convicted of a misdemeanor.

Ex Parte Ah Cha, 40 Cal. 426.

Under the Revised Statutes, the District Court has power to designate any prison of the State as the place of confinement; and of course may at any time modify its judgment in that respect, in misdemeanor cases.

III.

SENTENCE IS VOID.

The sentence is absolutely void for two reasons, viz:

1. It proceeds upon a conviction of two separate and distinct offenses, and the imprisonment for each offense *does not exceed one year;* therefore that part of the sentence which requires imprisonment in the penitentiary is absolutely void; being void, the appellant is deprived of his liberty without due process of law and in violation of the Fifth Amendment.

2. In the second place, the sentence is absolutely void for the further reason that the indictment in the first and fourth counts (they being the counts upon which the conviction was had), charges no crime known to the laws of the United States; in other words, the matters set forth in both the first and fourth counts, are not made criminal by any statute of the United States. Of these points in their order.

3. As to the first of these points, viz: That the sentence is void because it directs imprisonment in the penitentiary for a period that does not exceed one year on each count, we need only cite in support of our contention, the authority of the case of

Ex Parte Mills, 135 U. S. 270.

It was there decided that imprisonment in the penitentiary on a sentence that did not exceed one year *for any one offense,* is absolutely void and would be relieved

against on *habeas corpus*. There were, in that case, two indictments before the court; on one, the sentence was for a year; and on the other, for six months in the penitentiary; the sentences were made cumulative; the aggregate of the two sentences exceeded one year; but that feature of the case was held to make no difference; the validity of *each* sentence must be determined by itself; and the addition or aggregating of two void sentences could not make a valid sentence. It is true that in our case, there is only one indictment; but as a matter of law, that fact of itself, does not serve to differentiate. There are two counts upon both of which the appellant has been convicted and sentenced to the penitentiary. Each *count* is in law a separate indictment.

Selvester vs. United States, 170 U. S. 262, 266.

" Each count is in fact and theory a separate indict-
" ment."

Selvester vs. United States, 170 U. S. 267.

In our case there is one sentence for *two years upon two counts*. The conviction and sentence are for two separate and distinct offenses charged in the first and fourth counts respectively. As "each count is in fact and theory " a separate indictment", the case stands precisely as if the appellant had been convicted and sentenced to the penitentiary for the period of one year only, upon an indictment containing but one count; and had concurrently therewith been sentenced to the penitentiary by cumulative sentence for the further period of one year upon another indictment containing but one count. Now the fact

that the aggregate of these two sentences is two years, does not authorize imprisonment in the penitentiary. You cannot add two separate and distinct offenses with the term of imprisonment assigned to both collectively, and treat the sentence in the aggregate, and as being for one offense only. The very language of the statute governing the question (section 5541, Revised Statutes), prohibits a sentence to the penitentiary *for any one offense,* where the term of imprisonment does not exceed one year. Here there are *two separate* offenses for which sentence is given; and the aggregate sentence is two years. *It therefore does not exceed one year for each offense;* for that reason it is absolutely void to the extent that it requires imprisonment in the penitentiary. Under section 5541 of the Revised Statutes, no sentence is valid where the imprisonment is directed to be had in the penitentiary, unless the sentence for *each offense* exceeds the period of one year. Where, as here, there are *two* offenses upon which there is one sentence for the period of two years, it cannot possibly be a sentence exceeding one year for each offense; and it is therefore absolutely void according to the ruling in

Ex Parte Mills, 135 U. S. 270.

The sentence, as rendered, is an entirety. If void in part it is void *in toto.*

4. If a person is imprisoned for what is not a crime against the United States, he is entitled to his discharge on habeas corpus.

" If the commitment be against law, as being made by

" one who had no jurisdiction of the cause, or for a mat-
" ter for which by law no man ought to be punished, the
" court are to discharge." (Bac. Abr. Hab. Corp., 585.)

Say the Supreme Court:

" The latter part of this rule, when applied to impris-
" onment under conviction and sentence, is confined to
" cases of clear and manifest want of criminality in the
" matter charged, such as in effect to render the pro-
" ceedings void."

Ex Parte Siebold, 100 U. S. 376.

" Whenever a court undertakes to imprison for an
" offense to which no criminality is attached, it acts be-
" yond its jurisdiction."

Ex Parte Hollis, 55 Cal. 407.

" The court derives its jurisdiction from the law, and
" its jurisdiction extends to such matters as the law de-
" clares to be criminal, and none other, and when it un-
" dertakes to imprison for an offense to which no crimin-
" ality is attached it acts beyond its jurisdiction."

Ex Parte Corryell, 22 Cal. 181.

It is an absurdity to say that a court has jurisdiction to decide whether it possesses jurisdiction and that its decision in favor of itself vests in the court the jurisdiction which the law denies to it, so that its ruling is mere error and not usurpation.

Does either the first or the fourth count of the indictment against Mr. Dimmick charge him with an offense that is made a crime by any statute of the United States?

As to the first count, the record makes reference to section 5438 of the Revised Statutes in support of its averments. Certainly there is no other provision in the laws of the United States having the least application to the case presented by the first count. Therefore if section 5438 of the Revised Statutes does not sustain the first count, there is in that respect, presented by the record, a case "of clear and manifest want of criminality in the " matter charged such as in effect to render the proceed- " ings void". (Ex Parte Siebold, 100 U. S. 376.) It is charged in the first count that the prisoner presented for payment to one W. K. Cole, the cashier of the mint at San Francisco, a claim that once existed against the United States as a valid, subsisting and *bona fide* claim for materials actually purchased by the United States and actually furnished the United States at the price named in the claim. It is further charged that this claim had been paid by the United States in lawful recognition of an unquestioned liability and that at the time of such payment there was endorsed upon the face of it, by the creditor, a valid receipt of payment in full; that thereafter the prisoner presented this same identical claim to Cole, the cashier of the mint, for another payment; that when presented by the prisoner, the claim contained upon its face the receipt of payment in full. There is no charge that the prisoner made any representation or statement to Cole as an inducement to payment, and there is no averment that the prisoner obtained any money upon his presentation of the claim or otherwise, or that Cole paid out any of the money of the United States, on the claim. In other words, there is nothing whatever in the

first count, to indicate that the United States was defrauded, or to indicate that any attempt was made to defraud. The first count does, it is true, designate the claim to be "false, fictitious, and fraudulent"; but, these are mere epithets and conclusions of law, and signify nothing.

Van Weel vs. Winston, 115 U. S. 237, 238.

Especially are these designations of no importance when the indictment itself proceeds, and descending into particulars, establishes the fact by explicit averment that the claim is not and never was false, fictitious or fraudulent; but on the contrary, was at all times valid, genuine and *bona fide, in and of itself.*

According then, to the case made out in the first count, the prisoner is merely charged with presenting to one Cole, a cashier of the mint, for payment, a genuine, bona fide and valid claim that had been already paid by the United States, and at the very time bore upon its face a valid and genuine receipt of payment in full. That is all there is to the first count of the indictment. It would be strange indeed if such indifferent conduct as that charged in the first count, against the prisoner, is made criminal by the law of any civilized country. No fraud and no attempt at fraud is charged. Nothing but a mere idle presentation of a claim, valid and genuine, already paid, and showing on its face that it had been paid. In fact no fraud was possible, at least according to the averments of the first count. The necessarily idle and futile act of presenting the claim was not fitted or adapted or calculated to defraud or to injure the United

States. On a well settled principle of constitutional law, it does not reside within the power of the government to make criminal an act indifferent in itself and one that cannot injure or prejudice; and one that cannot affect the government or its affairs. There is an implied limitation on all governmental functions, that prohibits interference in matters that do not concern the State.

"The courts are not bound by mere forms, nor are they "to be misled by mere pretenses. They are at liberty, "indeed, they are under a solemn duty—to look at the "substance of things whenever the enter upon the "inquiry whether the legislature had transcended the "limits of its authority. If, therefore, a statute purport- "ing to have been enacted to protect the public health, the "public morals, or the public safety, has no real or sub- "stantial relation to those objects, or is a palpable in- "vasion of rights secured by the fundamental law, it is "the duty of the court to so adjudge, and thereby give "effect to the constitution."

Mugler vs. Kansas, 123 U. S. 661.

This was said of the police power of the States, but it is equally applicable to the "police power" of the nation. It certainly is no more competent for the nation than it is for the States to make criminal an act indifferent in itself and one that does not affect the public nor the government nor the affairs of the government. No man's liberty can be taken from him for the doing of an act indifferent in its nature and consequences, without violating the Constitution. Arbi-

trary power cannot constitutionally exist, in a republican form of government.

These general observations are pertinent only as indicating that Congress has no power to make criminal the matters charged in the first count of the indictment; nor has Congress attempted to do so. Section 5438 of the Revised Statutes, relied upon by the government to sustain the first count of the indictment, has absolutely no application at all to the case. The statute in terms is confined to claims that are "false, fictitious or fraudulent", and not claims that though paid, are genuine, valid and *bona fide*. The indictment in very restrictive language charges in the first count that the prisoner presented for payment, the valid, genuine and *bona fide* claim of the Selby Smelting and Lead Company; not that he made the claim the *basis* of another but false, fictitious and fraudulent claim; the latter is not the charge laid in the indictment. The first count proceeds upon the absolutely untenable and indefensible theory that the *Selby* claim, genuine, valid and *bona fide* as it was and as it is conceded to have been, up to the time of its payment, became thenceforth and by reason of its payment, a false, fictitious and fraudulent claim; that therefore when the prisoner presented *that* claim, after payment had been already made, he presented a false, fictitious and fraudulent claim. The question is not whether it was a *bona fide* and valid and subsisting claim in his hands, but whether it ever was a false, fraudulent or fictitious claim. Suppose that before the *Selby* claim was paid by the government, the prisoner presented it for payment, would anyone contend that

he was presenting a false, fictitious or fraudulent claim
Certainly not. Then how in reason or in law could th
claim thereafter become false, fictitious or fraudulen
merely because it had been paid? Conceding that a pai
claim is no longer a pending claim, it certainly is not in
trinsically a false, fraudulent or fictitious claim. Tru
it could not be the basis of another claim, and the latter
made upon the former would be false if not fraudulen
but in that case it would be essential, in order to bring th
matter within the statute, that the indictment charge th
presentation of the false claim and not charge as it doe
here, the presentation of the genuine claim that had bee
previously paid. A claim for payment of a valid, genuin
and *bona fide* claim already paid, is not such a claim as th
statute contemplates. The claim referred to in the sta
ute is not a claim or demand for *payment* of a clain
but, on the contrary, the claim presented for pay
ment is the claim that must be false, fictitious o
fraudulent, or the case is not within the statut
A claim of payment therefore is not the claim mentione
in the statute. It is the claim of which payment is de
manded, that the statute requires to be false, fraudule
or fictitious. The courts cannot extend the statute by co
struction. The statute has no application to a genuin
valid and *bona fide* claim that has been previously pai
The prisoner is only accused of presenting a claim of *th*
character; he is not charged with presenting a false, fict
tious or fraudulent claim. The charge is very specific tha
the claim he presented was the genuine and valid claim o
the Selby Smelting and Lead Company that had bee
previously paid. The statute requires that the claim *pr*

sented for payment be a false, fraudulent or fictitious claim; and certainly that charge cannot be predicated of the *Selby* claim. The statute can have sufficient scope and operation if it is confined to claims that have never been real or genuine; and it is the duty of the courts to give it that construction in favor of liberty.

United States vs. Hartwell, 6 Wall. 396.

"There can be no constructive offenses, and before a "man can be punished his case must be plainly and un- "mistakably within the statute."

United States vs. Lacher, 134 U. S. 628;
United States vs. Brewer, 139 U. S. 288.

"It is axiomatic that statutes creating and defining "crimes cannot be extended by intendment, and that no "act, however wrongful, can be punished under such a "statute unless clearly within its terms."

Todd vs. United States, 158 U. S. 282.

"The statute does not cover the transaction, and how- "ever reprehensible the acts of the plaintiffs in error may "be thought to be, we cannot sustain a conviction on that "ground. Although the objection is a narrow one, yet the "statute being highly penal, rendering the violator liable "to fine and imprisonment, we are compelled to construe "it strictly. Full effect is given to the statute by holding "that the language applies only to that kind of a paper "which depends upon a lottery, the drawing of which has "not yet taken place, and which paper purports to be a

" certificate, etc., as described in the act. If it be urged " that the act of these plaintiffs in error is within the " reason of the statute, the answer must be that it is so " far outside of its language that to include it within the " statute would be to legislate and not to construe legis- " lation."

France vs. United States, 164 U. S. 676, 682.

The cases are strictly analogous and the decision is directly in point.

We specially direct attention to the fact that the claim charged in the first count to have been presented for payment by the prisoner, is there stated to be the claim annexed as "Exhibit A". On an inspection of that claim it is seen to be the claim, the genuine and valid though paid and satisfied claim of the Selby Smelting and Lead Company. The averment is matter of essential description; the indictment identifies the claim presented as being that of the Selby Smelting and Lead Company. Surely *that claim* was never false, fictitious or fraudulent. The act of presenting it for a second payment may have been fraudulent, but that fact did not make the claim fraudulent, nor false nor fictitious. The statute is not at all directed against the fraudulent presentation of claims for payment but is confined to the presentation of false, fraudulent or fictitious claims,—an altogether different matter. The point is, that the *Selby* claim never having *itself* been a false, fictitious or a fraudulent claim against the United States, is not within the provisions of section 5438 of the Revised Statutes, and therefore the presenta-

tion of *that* claim for payment, is not made a crime by any law of the United States. It must be borne in mind in this connection, and it is self-evident, that in determining whether a claim is within the statute, the act of presenting it for payment cannot be considered. The statute requires that the claim itself be false, fraudulent or fictitious, independently of and without reference to its being presented for payment; otherwise it cannot be said that a false, fraudulent or fictitious claim was presented or made. No matter how fraudulent may be the act of presenting the claim, if it is not a false, fraudulent or fictitious claim it is not within the statute. It is charged in the first count that the prisoner not only presented the valid and genuine *Selby* claim for payment but that he also made the claim; the latter feature of the charge is an absurdity on the face of it. The prisoner could not *make* the Selby claim, when it is expressly alleged in the first count that the claim is both valid and genuine. It must be a sort of constructive making that the pleader referred to; but even if the prisoner did *make* the Selby claim as charged, it was never a false, fraudulent or fictitious claim; and therefore is not within the statute.

It is undoubtedly the case that the Selby claim would not be a true or genuine or valid claim in the hands of the prisoner; but it does not follow that the Selby claim would therefore be false, fraudulent or fictitious. Besides the prisoner is not charged with putting forth any claim of his own. It is important to the rights of the prisoner that we emphasize and lay special stress upon the proposition that the claim and the only claim the prisoner is

accused of presenting for payment, is the *Selby* claim which has never been false, fictitious or fraudulent. If it were the fact that the prisoner made or presented a claim of his own, that was false, fictitious or fraudulent, it of course was essential that it be so charged in the indictment. The sixth amendment of the Constitution in terms confers on the prisoner the right "to be informed of the " nature and cause of the accusation". We insist that the offense charged in the first count is not made a crime by any statute of the United States.

4. The fourth count of the indictment also fails to charge any offense that is made a crime by any law of the United States. Section 5497 of the Revised Statutes, is relied upon by the prosecution as being the statute making criminal the matters charged in the fourth count. This contention of the prosecution is manifestly untenable. Section 5497 of the Revised Statutes applies only to " every banker, broker, or other person, and to every " president, cashier, teller, director, or other officer of " any bank or banking association". This statute was amended by Act of February 3, 1879, chap. 42, and by the amendment extended to officers and their assistants in the internal revenue service (20 Stat. 280), thus indicating that the words "or other person" as used in the main section, only relate to persons of the same general class as *bankers and brokers.* "If all persons were meant, there was no " need of the specific enumeration."

Bishop on Stat. Crimes (3d Ed.), sec. 245;
Sutherland on Stat. Constr., sec. 272.

The fourth count charges that the prisoner was a *clerk* in the mint of the United States; he therefore is not within the provisions of section 5497 of the Revised Statutes.

We respectfully submit that the Circuit Court committed manifest error in refusing and denying the appellant, the writ of *habeas corpus*, and therefore the judgment appealed from should be *reversed* as prayed for.

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